

IN THE
SUPREME COURT OF MISSOURI

STATE OF MISSOURI,)	
Respondent,)	
)	
vs.)	Case No. SC91760
)	
MELVIN STOVER, JR.,)	
Appellant.)	

APPEAL TO THE MISSOURI SUPREME COURT
FROM THE CIRCUIT COURT OF CLAY COUNTY
SEVENTH JUDICIAL CIRCUIT
THE HONORABLE LARRY D. HARMAN, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

This appeal follows Appellant's conviction after a jury trial in Clay County, Missouri for the class A felony of trafficking drugs in the first degree, Section 195.222.5, RSMo 2008. Appellant was sentenced to 12 years imprisonment without possibility of probation or parole.

As this appeal does not involve the issues reserved for the exclusive jurisdiction of the Missouri Supreme Court, jurisdiction lies in the Missouri Court of Appeals, Western District. Article V, Section 3, Mo.Const. (as amended 1982). However, this Court accepted transfer after opinion on application of the Respondent.

STATEMENT OF FACTS

References are to appendix (A); legal file (L. F.); transcript (Tr.); exhibits (St.'s ex or Def.'s ex.). Appellant, Melvin Stover, Jr., was convicted, following a jury trial of trafficking drugs in the first degree, Section 195.222.5, RSMo (A1-A2; L. F. 103, 129-130). Appellant was sentenced to 12 years imprisonment without possibility of probation or parole (A1-A2; L. F. 129-130; Tr. 927-928).

Appellant was charged by information, which was amended on the day of trial to eliminate the possibility of probation or parole and charged trafficking drugs in the second degree in the alternative under Section 195.223.5, RSMo (L. F. 13-14, 21, 58-59; Tr. 111-113). The case was heard in Clay County on a change of venue from Lafayette County (L. F. 4, 11-12, 19; Tr. 3). A motion to suppress was filed and heard on September 5, 2007 (L. F. 16-17; Tr. 1). Evidence at the suppression hearing was as follows:

The state introduced testimony as well as a recording made during the traffic stop, which lasted approximately 68 minutes (St.'s ex. 2 at suppression hearing—same as St.'s ex. 33 at trial). On or about November 25, 2003 at approximately 10:53 a.m., Corporal B. S. Hagerty of the Missouri State Highway Patrol was engaged in traffic law enforcement in Lafayette County (L. F. 8; Tr. 3, 7). He said that he noticed a tan 2004 Grand Marquis automobile with California license plates traveling less than 40 feet behind a tractor trailer on eastbound Interstate 70 at an approximate speed of 65 miles per hour (Tr. 8-9, 16). Corporal

Hagerty followed the Grand Marquis about half a mile, noting that it drove onto the center line and slowed to 55 to 60 miles per hour after the Corporal pulled in behind it (Tr. 11-14). Corporal Hagerty believed that the vehicle was a rental car before he stopped it (Tr. 16-17, 77-78).

After Corporal Hagerty activated his emergency lights, the vehicle pulled safely to the shoulder of the road (Tr. 15). Upon approaching the vehicle, Corporal Hagerty noticed several gift bags and newly purchased items in the passenger compartment (Tr. 16). Two black males occupied the vehicle, and Corporal Hagerty spoke with them (Tr. 16, 69). Corporal Hagerty identified Appellant as the driver of that vehicle (Tr. 16). Appellant identified himself with a Washington, D. C. driver's license (Tr. 19). The officer asked Appellant to have a seat in his patrol car (Tr. 19).

Appellant told the corporal that he was coming from Nevada and returning to Washington, D. C. (Tr. 22-23). According to Corporal Hagerty, Appellant used a lot of "ah's" and "uh's" in his speech at that point (Tr. 22-23). However, the DVD does not contain repeated "ah's" and "uh's" on Appellant's part when answering this question (St.'s ex. 2 at suppression hearing; St's ex. 33 at trial). Appellant said he had purchased a one-way plane ticket to gamble in Las Vegas, and he had rented a vehicle one-way to return (Tr. 23, 25). The DVD also reveals that the corporal asked Appellant about the price of the tickets and who paid for them (St.'s ex. 2 at suppression hearing; St.'s ex. 33 at trial). Appellant said his companion was Oris Butler (Tr. 25). The officer asked about luggage because

there was none visible in the vehicle (Tr. 22, 25). Appellant said he did not have any luggage (Tr. 26). Corporal Hagerty said he thought this was highly unusual (Tr. 26). Appellant said he had arrived in Las Vegas on Saturday (Tr. 28).

Corporal Hagerty asked where Appellant had stayed, and Appellant said it was at a hotel down the street from the MGM, where they had been gambling (Tr. 28).

Corporal Hagerty testified that he had to repeat his questions multiple times (Tr. 28). He ran a computer check on Appellant, which indicated he had never been previously arrested (Tr. 29). Corporal Hagerty inquired about Appellant's passenger's arrest history, and Appellant said he had not been arrested in the last four or five years (Tr. 29). The corporal asked how long they had intended to stay in Las Vegas, and Appellant said one day (Tr. 29-30). Corporal Hagerty found this to be unusual (Tr. 29-30).

Corporal Hagerty asked Appellant about his employment, and Appellant said he was employed by the government; then clarified that he was a city bus driver (Tr. 30). Corporal Hagerty testified that he found Appellant's response to be suspicious (Tr. 30-31). The DVD also reveals that Corporal Hagerty also asked whether Appellant drove on local trips, whether they knew anyone in Las Vegas or visited anyone, which casinos they gambled in, how they did gambling, whether Appellant and Butler worked together, their backgrounds, how they originally met and about Appellant's wife's employment, among other things. (St.'s ex. 2 at suppression hearing; St's ex. 33 at trial).

Corporal Hagerty obtained the rental agreement from the passenger, Oris Butler, and engaged him in a brief conversation (Tr. 27). Butler said they had gone to Las Vegas on Friday instead of Saturday (Tr. 31-32). Butler verified that they had no luggage with them (Tr. 31-32).

Appellant had said that the need for a rental car was because of lack of funds, but Butler said they “got hung up” in Las Vegas (Tr. 32). According to Corporal Hagerty, a one-way airfare and using a different means of transportation home meant that they were involved in illegal activity (Tr. 33, 45-46). Butler’s original demeanor was calm; then he began to make furtive movements, according to Hagerty (Tr. 33-34). The records check on Butler revealed that he had been arrested several times for drug-related offenses (Tr. 35-36, 39).

Corporal Hagerty returned to the patrol car and talked with Appellant again (Tr. 34). The corporal asked Appellant if there was anything illegal in the vehicle, and Appellant said there was not (Tr. 39). According to Corporal Hagerty, there was a change in Appellant’s demeanor, and he became argumentative (Tr. 36-37, 49). Corporal Hagerty asked for consent to search the vehicle, and Appellant denied consent to search (Tr. 36, 49, 59). Corporal Hagerty then contacted a “canine unit” (Tr. 50). It took about 20 minutes more for the drug dog to arrive (Tr. 60) about 45 minutes after the initial stop (Tr.58) . The dog was deployed, and the parties agreed that the testimony would be that the dog alerted on the vehicle (Tr. 60, 93-94, 105).

Corporal Hagerty then searched the vehicle (Tr. 60). When he opened the trunk of the vehicle, he found a closed suitcase containing plastic containers of what Corporal Hagerty at trial testified he believed was PCP (phencyclidine) (Tr. 61), although the drug dog was never trained to detect PCP (Tr. 93). Both Appellant and Butler were arrested and *Mirandized* after the search (Tr. 96, 98-99).

On cross-examination, Corporal Hagerty claimed he did not know how long the stop lasted or how long it normally took to write a ticket for following too closely (Tr. 67-68). He could not name any interstate highways that he would not consider to be drug corridors (Tr. 71). He agreed that some drivers tap their brakes when a marked patrol car pulls in behind them, and it does not always indicate criminal activity (Tr. 73). (At trial, it was revealed that Corporal Hagerty was in an unmarked patrol vehicle (Tr. 549-550)). Corporal Hagerty agreed that he separated the pair to try to find inconsistencies in their stories, but several of the statements the two made were consistent with each other (Tr. 81, 87).

At first, Corporal Hagerty admitted that he had suspicions prior to engaging in a conversation with Appellant, but said it was the “totality of circumstances” that led him to believe that the pair was engaged in criminal activity (Tr. 79-81). He admitted that Appellant was not free to leave the scene after he was stopped (Tr. 85, 92, 100). There was another unnamed trooper with him in the patrol vehicle during the stop, but he could not remember the trooper’s name (Tr. 94-95).

The trial court denied Appellant's motion to suppress (L. F. 20). Trial commenced on September 8, 2008 (L. F. 21;Tr. 110). At the outset, Appellant waived jury sentencing and renewed his objection to the evidence based on his motion to suppress (Tr. 124, 127, 321-323). Trooper William Oliver of the Missouri State Highway Patrol was the first witness (Tr. 323-324). He was on duty with his drug-detection dog, Yery, on the morning of November 25, 2003 (Tr. 327, 342, 345, 347). Trooper Oliver responded to Corporal Hagerty's call for canine assistance with a traffic stop at the 57-mile marker on Interstate 70 near Concordia (Tr. 344-346). It took him about 20 minutes to get there, and he arrived at about 11:15 a. m. (Tr. 345, 348-349). He parked his patrol vehicle between Appellant's car and Corporal Hagerty's patrol vehicle (Tr. 345-346) with the video camera.

Trooper Oliver deployed Yery and went around the stopped vehicle three times (Tr. 350-351). According to Trooper Oliver, Yery alerted on the rear and passenger side of the vehicle (Tr. 353). Trooper Oliver and Corporal Hagerty searched the vehicle, and when Corporal Hagerty opened the trunk, he found a suitcase with juice bottles containing a light yellowish tinted liquid (Tr. 355- 356, 374). Trooper Oliver testified that initially "we" believed it was "meth" (Tr. 355). Methamphetamine is one of the substances that Yery was trained to detect; PCP was not (Tr. 329-330). Only one illegal substance was found (Tr. 374-375).

Also located in the trunk of the vehicle near the suitcase were a Fossil brand wrist watch and a sweatshirt (Tr. 357, 360-363). Trooper Oliver placed the

passenger, Mr. Butler, under arrest, and Corporal Hagerty arrested Appellant (Tr. 356). Trooper Oliver first testified that he asked Butler whose watch was in the vehicle, and Butler said the watch belonged to him (Tr. 360-361). Later, he identified Appellant as the person who indicated the watch was his (Tr. 363-364). He also mis-identified Appellant as Butler in court (Tr. 375).

Trooper Oliver did not actually know to which occupant of the vehicle the suitcase belonged, and he admitted it was an assumption that the suitcase belonged to one or both of them because it was found in the vehicle (Tr. 377-378). Additionally, numerous clothing items were found in the vehicle (Tr. 375).

Corporal Hagerty testified substantially the same at trial as he did at the suppression hearing with the following additions (Tr. 3-100, 382-613). The state elicited testimony that Corporal Hagerty had made over a thousand drug arrests on Missouri highways and from that experience he had an ability to determine whether he believed somebody may be engaging in criminal activity (Tr. 397-398, 401-402). Corporal Hagerty stated when he stopped the car and made contact with the occupants, he explained the reason for the stop, and Appellant said he understood (Tr. 418, 425). After talking with Appellant in the patrol vehicle, he became suspicious of their trip itinerary, and he added that “[t]his started before I even activated my emergency equipment” (Tr. 423).

According to Corporal Hagerty, when he asked for consent to search, he could see his pulse beating on the side of Appellant’s neck (Tr. 432). Appellant began to ask Corporal Hagerty why he stopped him (Tr. 433). Over Appellant’s

objection, Corporal Hagerty testified that Appellant refused consent to search the vehicle (Tr. 434-436). Appellant told Corporal Hagerty that his mother was getting ready to be admitted to the hospital and that he needed to get there (Tr. 437-438).

Corporal Hagerty also asked Appellant and Mr. Butler about the price of the airline tickets, who had purchased them, and their arrival dates, and he testified over Appellant's hearsay objection that Butler's answers were inconsistent with Appellant's (Tr. 457- 461). When Corporal Hagerty told Appellant what Mr. Butler had said, Appellant then agreed their arrival date was not Saturday but Friday (Tr. 461).

State's exhibit 33, the DVD of the traffic stop, was played for the jury over Appellant's objection to it on the basis that it was obtained as a result of an illegal detention, that it contained Appellant's custodial statements without being *Mirandized*, and that it was improper to introduce his invocation of his Fourth Amendment rights before the jury, among other reasons (L. F. 65; Tr. 490-495, 503-504).

Exhibits that were first disclosed to the Appellant on September 3, 2008, which were documents recovered from the vehicle, including rental car documents and airline ticket documentation for Mr. Butler from Los Angeles to Las Vegas were received into evidence over the Appellant's objection (L. F. 64-65; Tr. 507, 510-538, 605-607).

The Fossil wrist watch that the officers found in the search of the trunk was in a small gift bag, and after Appellant was arrested, he said that the watch was in the passenger compartment, according to Corporal Hagerty (Tr. 466, 585, 602). Corporal Hagerty stated that he had no way of knowing if the watch was put in the trunk before or after the suitcase (Tr. 586).

Over Appellant's objection, the state elicited testimony from Corporal Hagerty that he had received a commendation from the Drug Enforcement Administration for this seizure because it was the largest seizure of PCP in the United States until 2003 (Tr. 546-547).

On cross-examination, Corporal Hagerty said that the reason the alleged traffic violation was not on the DVD was because Appellant slowed down before he activated the video equipment in the patrol vehicle (Tr. 562-563). He agreed that the correct driving response to following too closely was to slow down to increase the distance between vehicles (Tr. 563). He stated the fact that he knew there were two black males in the vehicle before he stopped it was insignificant, but the fact that they were two of the same sex occupants was significant in arousing his suspicions (Tr. 558-561, 594).

Corporal Hagerty agreed that it was approximately 45 minutes after he made the traffic stop before Trooper Oliver arrived on the scene (Tr. 568). He did not write Appellant a ticket for following too closely during that period, and Appellant did not prevent him from doing so (Tr. 567-568). Corporal Hagerty

said he believed Appellant was warned (Tr. 567). Corporal Hagerty did not see the dog alert (Tr. 583).

Appellant wore headphones in the courtroom to listen to the evidence during the trial, but Corporal Hagerty disagreed that having a hearing problem might have been a plausible reason for Appellant asking him to repeat his questions (Tr. 574-575). Corporal Hagerty testified that asking him to repeat questions was an indicator that aroused his suspicions (Tr. 575).

No items were seized from Appellant's person, and Corporal Hagerty did not smell anything on Appellant's person to suggest that he had been in proximity to illegal drugs (Tr. 590). Appellant told Hagerty he did not know the suitcase was in the trunk or what was in it (Tr. 592). One could not see inside the suitcase upon opening the trunk (Tr. 599) without opening the suitcase. When asked if he was struck by an odor when the trunk was opened, Corporal Hagerty responded "[a]fter I opened the suitcase" (Tr. 599).

Thomas Gray is a retired sergeant from the Missouri State Highway Patrol, who had been in charge of the narcotics team (Tr. 613-615, 641, 644). On November 25, 2003, he responded to a call to meet Corporal Hagerty at the Lafayette County Sheriff's Office (Tr. 616-617). Corporal Hagerty presented the seized evidence to him consisting of two two-quart bottles and nine gallon-sized bottles of liquid (Tr. 617, 628). Sergeant Gray took samples of the liquid from each of the 11 bottles, which had been sealed with duct tape (Tr. 617-619, 621, 627-628). The samples were then submitted to the Missouri State Highway Patrol

Crime Laboratory for analysis (Tr. 633). Sergeant Gray also performed field tests on the substance, which erroneously indicated it was methamphetamine (Tr. 640).

Sergeant Gray interviewed Appellant in the jail and testified that he *Mirandized* him first (Tr. 634-636). Appellant said that he, Mr. Butler and a person known as “Lump” flew from Washington, D. C. to Las Vegas to gamble and hoped to win enough money to fly back to Washington, D. C. (Tr. 636-637, 648). According to Sergeant Gray, Appellant told him that they had spent two nights; one night at the MGM Grand and one night at a Sheraton (Tr. 637). They lost money, so they had to rent a car to drive back to Washington, D. C. (Tr. 637).

Sergeant Gray testified that Appellant said he took a taxi to the Budget car rental agency, rented a car then went back to the hotel and picked up Mr. Butler (Tr. 637). Appellant told him he had not looked in the trunk and did not know what was in it (Tr. 638). Appellant said he had not gone to Long Beach, California before going to Las Vegas (Tr. 649). Sergeant Gray did not record the interview with Appellant; he said he never does so (Tr. 642-643). His notes of the interview were destroyed when he retired (Tr. 644).

Karen Hoover testified that she was a “criminalist” with the Missouri State Highway Patrol Crime Laboratory (Tr. 651-652). She tested 11 samples of the substance contained in state’s exhibit 12 (Tr. 659-663). When she first tested the substance, it tested positive for methamphetamine (Tr. 694). Other tests indicated that the samples contained phencyclidine, also known as PCP (Tr. 669-670). On direct examination, Hoover testified that the density of the samples was from .67

grams per milliliter up to .74 grams per milliliter (Tr. 676-677). However, on cross-examination, Hoover stated she did not test the substance for density; she tested the weight and volume (Tr. 689). Hoover testified that the weight of the substance in the 11 vials she tested was 224.12 grams (Tr. 665). Hoover's laboratory report, the sample vials and their container were all entered into evidence over Appellant's objection based on his motion to suppress (L. F. 64-65; Tr. 671-672, 702-703; St.'s ex.'s 1-12, 47).

The state rested and Appellant filed and argued a Motion for Judgment of Acquittal at the Close of the State's Evidence, which the court denied (L. F. 67-68; Tr. 705-710, 727).

Appellant's wife, Tyice Stover, testified for the defense (Tr. 727-732). She stated that Appellant's mother, Annie Stover, suffered from serious health problems during the latter part of 2003 (Tr. 728). Appellant's mother was hospitalized many times due to heart problems and died of a heart attack in 2005 (Tr. 728, 732).

The defense rested and filed and argued a Motion for Judgment of Acquittal at the Close of All the Evidence, which the trial court denied (L. F. 69-70; Tr. 733-736). At an instruction conference, defense counsel objected to the verdict directors because the definitions of possession in the instructions were confusing and misleading to the jury (Tr. 738). The trial court overruled the objection (Tr. 738).

The state played the DVD of the traffic stop and/or portions thereof four times during closing argument (Tr. 741, 788-789, 792; St.'s ex. 33). At one point during closing argument, the prosecutor told the jury to “[t]hink about when he was first asked for permission to search the car,” then played a portion of the DVD containing Appellant’s refusal to consent to the search over Appellant’s objection that it was improper to use the evidence of his invocation of his constitutional rights as evidence of guilt (Tr. 788-789).

The jury found Appellant guilty of trafficking in the first degree (L. F. 103; Tr. 805). Appellant’s Motion for Judgment of Acquittal, or in the Alternative, for New Trial was denied (L. F. 23, 106-128; Tr. 904). Four character witnesses testified on Appellant’s behalf prior to sentencing (Tr. 867-884, 906-912). The trial court sentenced Appellant to 12 years imprisonment without possibility of probation or parole (L. F. 129-130; Tr. 927-928; A-1-A-2).

Notice of appeal to the Missouri Court of Appeals, Western District was filed December 8, 2008 (L. F. 131-132). This Court accepted transfer after opinion, and this appeal follows.

POINT RELIED ON

I.

The trial court erred in denying Appellant's Motions for Judgment of Acquittal and entering judgment and sentence against Appellant for trafficking drugs in the first degree, because by doing so the court violated Appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Missouri Constitution, in that the state failed to prove the elements of trafficking drugs in the first degree, by not producing sufficient evidence to convince a reasonable trier of fact that Appellant knowingly possessed the contraband.

State v. Ingram, 249 S.W.3d 892 (Mo. App., W.D. 2008);

State v. Johnson, 81 S.W.3d 212 (Mo. App., S.D. 2002);

State v. West, 559 S.W.2d 282 (Mo. App., St. L. D. 1977);

State v. Driskell, 167 S.W.3d 267 (Mo. App., W.D. 2005).

POINT RELIED ON

II.

The trial court clearly erred in failing to sustain Appellant's Motion to Suppress Evidence and Statements and in allowing into evidence at trial the evidence obtained as a result of the traffic stop, because the prolonged detention of Appellant without reasonable suspicion of criminal activity and beyond the time reasonably required to complete a traffic ticket was unlawful and violated Appellant's rights as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 15 and 19 of the Missouri Constitution.

State v. Maginnis, 150 S.W.3d 117 (Mo. App., W.D. 2004);

State v. Sund, 215 S.W.3d 719 (Mo. banc 2007);

State v. King, 157 S.W.3d 656 (Mo. App., W.D. 2005);

United States v. Beck, 140 F.3d 1129 (8th Cir. 1998).

POINT RELIED ON

III.

The trial court clearly erred in failing to sustain Appellant's Motion to Suppress and in allowing into evidence at trial the statements Appellant made during the traffic stop prior to being *Mirandized* because the admission of these custodial statements deprived Appellant of his right to be free from self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18(a) and 19 of the Missouri Constitution in that Appellant was not free to leave and *Miranda* warnings were required prior to Corporal Hagerty questioning Appellant while he was being detained.

State v. Hosto-Worthy, 877 S.W.2d 150 (Mo. App., E.D. 1984);

State v. Wilson, 169 S.W.3d 870 (Mo. App., W.D. 2005);

Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966);

State v. Lynn, 829 S.W.2d 553 (Mo. App., E.D. 1992).

POINT RELIED ON

IV.

The trial court erred in allowing evidence and argument regarding Appellant's refusal to waive his Fourth Amendment right to consent to a search of the vehicle because such evidence and argument deprived Appellant of his rights to due process and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that such evidence and argument induced the jury to infer that Appellant was guilty based on his invocation of his constitutional right against unreasonable searches and seizures.

Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965);

State v. Palenkas, 933 P.2d 1269 (Ariz. Ct. App. 1996);

Padgett v. State, 590 P.2d 432 (Alaska 1979);

Gomez v. State, 572 So.2d 952 (Fla. Dist. Ct. App. 1990).

POINT RELIED ON

V.

The trial court abused its discretion in overruling Appellant's hearsay objection and allowing the testimony of Corporal Hagerty regarding the commendation he received in this case for making the largest PCP seizure in the history of the United States until 2003 because by doing so the court deprived Appellant of his rights to cross-examination of the witnesses against him and to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18 (a) of the Missouri Constitution in that the evidence was inadmissible hearsay, irrelevant and calculated to inflame the passions of the jury against Appellant.

State v. Robinson, 111 S.W.3d 510 (Mo. App., S.D. 2003);

State v. Russell, 872 S.W.2d 866 (Mo. App., S.D. 1994);

Gates v. Sells Rest Home, Inc., 57 S.W.3d 391 (Mo. App., S.D. 2001);

State v. Berezuk, 55 S.W.2d 949 (Mo. 1932).

POINT RELIED ON

VI.

The trial court erred in overruling Appellant's objection to the verdict-directing instruction, instruction No. 6, because the verdict director did not require the jury to find that Appellant knew of the substance's content and character or that he was aware of its presence and nature which prejudiced Appellant and denied him his rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

State v. Burns, 457 S.W.2d 721 (Mo. 1970);

State v. Ward, 745 S.W.2d 666 (Mo. banc 1988);

State v. Zink, 181 S.W.3d 66 (Mo. banc 2005);

State v. Sallee, 436 S.W.2d 246 (Mo. 1969).

ARGUMENT

I.

The trial court clearly erred in denying Appellant's Motions for Judgment of Acquittal and entering judgment and sentence against Appellant for trafficking drugs in the first degree, because by doing so the court violated Appellant's right to due process of law as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and by Article I, Section 10 of the Missouri Constitution, in that the state failed to prove the elements of trafficking drugs in the first degree, by not producing sufficient evidence to convince a reasonable trier of fact that Appellant knowingly possessed the contraband.

Appellant contends that the trial court erred in denying his Motions for Judgment of Acquittal and in sentencing Appellant on the jury's verdict (L. F. 22-23, 67-70, 106-123; Tr. 710, 733-736, 904, 928). The state failed to prove beyond a reasonable doubt that Appellant committed the crime of trafficking drugs in the first degree, because there was insufficient evidence that he knowingly possessed the PCP (Tr. 323-705).

The standard of review when a challenge to the sufficiency of evidence is raised is for the appellate court to review the record "to determine whether 'sufficient evidence was admitted at trial from which a reasonable trier of fact could have found each element of the offense to have been established beyond a reasonable doubt.'" *State v. Ingram*, 249 S.W.3d 892, 893-894 (Mo. App., W.D.

2008) (quoting *State v. Chavez*, 128 S.W.3d 569, 573 (Mo. App., W.D. 2004)). In considering the question of whether the evidence was sufficiently substantial to submit the case to a jury, an appellate court reviews the evidence in the light most favorable to the verdict. *State v. Dayringer*, 755 S.W.2d 698, 700 (Mo. App., S.D. 1988). Under this standard of review, Appellant asserts the state failed to prove Appellant knowingly possessed any PCP, and therefore, he should not have been convicted of trafficking.

Possession of contraband is found where: “A person, with the knowledge of the presence and nature of a substance, has actual or constructive possession of the substance. A person has actual possession if he has the substance on his person or within easy reach and convenient control. A person who, although not in actual possession, has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons is in constructive possession of it.” *State v. Ingram, supra* at 895 citing Section 195.010(32), RSMo.

The *Ingram* case is instructive on the issues in the case at bar. In *Ingram*, the Appellant was the driver of a vehicle stopped for erratic driving and no front license plate. *Id.* at 894. Both the passenger and the appellant had outstanding warrants for which they were arrested. *Id.* The appellant initially told the officer that the vehicle was hers. *Id.*

After the appellant was secured upon arrest, the officer found a small, pebble-like object, the size of aquarium gravel, in the driver’s seat where the

appellant had been seated. *Id.* at 894. The object turned out to be crack cocaine. *Id.* Two rocks of crack cocaine were found in the passenger's purse. *Id.* No other contraband was found in the vehicle or on the appellant's person. *Id.* at 894. Later, the appellant told a police detective that she did not really own the vehicle but that she drove it. *Id.* She also denied having any drugs on her at the time of her arrest. *Id.* at 894.

On appeal, the state argued that the appellant was in actual possession of the crack cocaine, not only because she claimed ownership of the car and treated it as her own, but also because the crack cocaine was found on the seat where she 'had been sitting and over which she had exclusive control.' *Id.* at 895. However, the appellate court rejected the state's theory and noted that the mere fact that the appellant was sitting on the rock of crack cocaine was "not enough to establish that she was aware of the contraband." *Id.* at 895 citing *State v. Driskell*, 167 S.W.3d 267, 269 (Mo. App., W.D. 2005). "Possession without knowledge of such possession is not possession in the legal sense of that word." *Id.* citing *State v. Burns*, 457 S.W.2d 721, 724 (Mo. 1970). *Accord State v. West*, 559 S.W.2d 282, 285 (Mo. App., St. L.D 1977) (appellant's conviction reversed when only evidence against her was that contraband was found in trunk of car that she owned).

The court went on to explain in *Ingram, supra*, that when there is joint control of a vehicle, "a criminal defendant is only deemed to have possession and control where sufficient additional evidence connects him to the controlled

substance.” *Ingram* at 896 citing *State v. Chavez*, 128 S.W.3d 569, 574 (Mo. App., W.D. 2004). “Such additional evidence buttressing the inference of possession may include ‘nervousness exhibited during the search of the area, the subject of controversy in plain view, commingling of the controlled substance with the defendant’s personal belongings, and the conduct and statements of the accused.’” *Ingram* at 896 (quoting *Chavez, supra* at 574). In other words, the “totality of circumstances” is considered. *Ingram* at 896.

The court noted the following circumstances in *Ingram*: There was no evidence of nervousness on the appellant’s part, no incriminating statements, the drug was not in plain view when the appellant was in the vehicle and was not commingled with any of the appellant’s possessions. *Id.* at 896. Therefore, the court found the state failed to prove sufficient facts to establish that the appellant possessed the drugs and reversed the appellant’s conviction. *Id.*

Here, just as in *Ingram*, the state has failed to prove its case. Since the Appellant did not have exclusive control of the vehicle, the state was required to present additional facts to make its case. However, the state’s evidence fell short. There was no evidence that Appellant was shaking or exhibited unusual nervousness, no incriminating statements concerning the drug, the drug was not in plain view when Appellant was in the vehicle and was not commingled with any of Appellant’s belongings (Tr. 417-613).

The Fossil wrist watch that the state used to try to connect Appellant with the drugs was not sufficient to buttress an inference of possession, because there

was no evidence as to who put the watch inside the trunk or when the watch was put inside the trunk in relationship to the suitcase (Tr. 360-364, 473, 488, 585-586). Hagerty testified that after the search, Appellant said the watch was in the passenger compartment (Tr. 586). Even assuming *arguendo* that Appellant put the watch in the trunk after the suitcase was already inside the trunk that still does not prove that Appellant knew what the contents of the suitcase were, because the suitcase was opaque and there was no odor emanating from it (Tr. 599). It was not until after Corporal Hagerty opened the suitcase that he noticed any odor (Tr. 599). Furthermore, Appellant had no odor of illegal substances about his person and no drugs were found on or near him. The facts in this case are substantially weaker than in *Ingram* (Tr. 590).

The Appellant also refers this Court to the case of *State v. Johnson*, 81 S.W.3d 212 (Mo. App., S.D. 2002). In the *Johnson* case, the appellant was a passenger in a vehicle stopped for following too closely. *Id.* at 214. The appellant was also the renter of the vehicle. *Id.* He was very nervous and a large quantity of marijuana was found hidden inside the “factory voids” in the vehicle during a consent search. *Id.* at 214, 217. The appellate court found “[t]his evidence alone fails to show that Defendant had knowledge of the presence of the marijuana and control over it.” *Id.* at 217. The court reversed and remanded with instructions for the trial court to enter a judgment of acquittal. *Id.*

The facts in *Johnson* are strikingly similar to the facts in the instant case. Here, that Appellant jointly occupied a vehicle he had rented in which a large

quantity of contraband was found hidden in a suitcase in the trunk, fails to prove he had knowledge of the presence of the contraband and control over it (422, 466-467, 599).

Yet another appellate decision which supports reversal of the trial court's judgment is *State v. West, supra*, 559 S.W.2d 282 (Mo. App., St. L. D. 1977). In *West*, the Appellant was convicted after PCP was found during a search of her vehicle to which others had access. *Id.* at 284. The PCP was inside a box in the trunk of West's vehicle *Id.* In reversing the Appellant's conviction in *West* due to insufficient evidence, the court noted, "there was no evidence that the defendant had ever touched the box found in the trunk, nor, for that matter, any evidence defendant had ever entered the trunk. Defendant made no declarations indicating knowledge of the drugs. There was no evidence that the defendant had exclusive control of the automobile. . . ." *Id.* at 285.

Likewise, in the instant case, there was no evidence that Appellant had ever touched the suitcase, the bottles that were in it or even entered the trunk, for that matter (Tr. 323-651). The evidence was that Appellant said he had not looked in the trunk and did not know the suitcase was in there and thought that the watch was in the passenger compartment (Tr. 585, 592, 602, 638). Just as in *West*, Appellant made no declarations indicating knowledge of the drug (Tr. 360-651; St.'s ex. 33). Moreover, here there was no evidence that the Appellant had exclusive control of the automobile; in fact Mr. Butler, the passenger, had equal

access to the vehicle (Tr. 417, 457-460; St.'s ex. 23). The state's evidence here is clearly insufficient under the analysis in *West*.

Another convincing case supporting Appellant's position is *State v. Driskell*, 167 S.W.3d 267 (Mo. App., W.D. 2005). In that case, the Appellant was seated in the driver's seat of a parked vehicle, which he owned jointly with another person. *Id.* at 268. A companion was outside the vehicle washing the windows. *Id.* The officers recognized the appellant and arrested him on an outstanding warrant. *Id.* A search of the vehicle revealed a plastic pouch with a cigarette package that held plastic baggies of methamphetamine and marijuana and a syringe. *Id.*

The state argued on appeal that Driskell had actual possession of the contraband items because they were located next to his driver's seat in his console and "within his easy reach and convenient control." *Id.* at 269. However, the appellate court rejected the state's argument, stating "[t]he mere fact that Driskell was seated next to the closed console does not indicate that he was aware of the contraband hidden therein." *Id.*

The court considered the issue of constructive possession and noted that "[p]articularly in cases where there is joint access to a vehicle, the State must present evidence of 'some incriminating circumstance' to establish the defendant's knowledge of and control over the drugs." *Id.* at 269 (quoting *State v. Bristol*, 98 S.W.3d 107, 111 (Mo. App., W.D. 2003)). Although Driskell was the owner and driver of the vehicle, he did not have exclusive control of the area where the drugs

were found. *Driskell* at 269. The co-owner and the companion who was washing the windows presumably also had access to the console. *Id.*

The court found the evidence was insufficient to prove that Driskell had knowledge of the contraband. *Id.* at 270. None of it was in plain view and none of Driskell's personal belongings were commingled with the drugs. *Id.* There was no evidence of incriminating conduct since "Driskell did not appear nervous, nor make any suspicious movements or attempt to flee when the officers approached him sitting in the driver's seat." *Id.* Ultimately, the court held the "State failed to show Driskell had any awareness the illegal drugs were hidden in the car." *Id.* at 270.

Once again, the evidence against Mr. Stover is considerably weaker than was the case against Mr. Driskell. Corresponding with *Driskell*, here, at least one other person, Mr. Butler, had access to the area where the contraband was found hidden (Tr. 417, 457-460). As in *Driskell*, there was no evidence of any incriminating conduct, and the Appellant did not make any suspicious movements or attempt to flee during the traffic stop (Tr. 382-613; St.'s ex. 33). Under the holding in *Driskell*, this Court should find the state failed to make a submissible case. *See also, State v. Moses*, 265 S.W.3d 863 (Mo. App., E.D. 2008) (routine access to trailer where drugs were found and flight upon officers' arrival coupled with admission as to knowledge of presence, but not possession of drugs was not enough to show defendant exercised dominion and control).

The case of *State v. Mercado*, 887 S.W.2d 688 (Mo. App., S.D. 1994) is also persuasive authority that the evidence does not support Appellant's conviction. In *Mercado*, the Appellant was a passenger in a van stopped for following too closely. *Id.* at 689. He was lying on a seat in the back of the van. *Id.* at 689. The Appellant told the officer he was helping his companion drive the vehicle and did not know their destination. *Id.* A consent search revealed nearly 200 pounds of marijuana hidden in the door panels and walls of the van. *Id.* at 689-690.

The appellate court noted “[t]he only direct evidence connecting the defendant with the drugs he is accused of possessing is that he was a passenger in the van and had been assisting the owner in driving the van. The marijuana was not visible upon entry into the van. It was concealed. . . . There was no discernable odor in the passenger compartment of the van, either emitted by the marijuana or something used to mask an otherwise pungent smell.” *Id.* at 691. There was also “no weapon present to indicate a perceived need to guard valuable cargo.” *Id.* at 692. Even though the weight and volume of the prohibited substance was far greater in *Mercado* than in Mr. Stover's case, that fact did not support a verdict of guilt. *Id.* The appellate court found that the evidence was insufficient and that the trial court had erred in failing to grant Mercado's Motion for Acquittal. *Id.*

So it is in the instant case. The only direct evidence connecting Appellant to the hidden contraband was that he occupied the vehicle in which it was found

(Tr. 323-651). The PCP was not visible upon entry to the passenger compartment or even when the trunk was opened for that matter (Tr. 355, 466-468, 599). It was hidden inside an innocent-looking opaque suitcase (Tr. 355, 466-468, 599; St.'s ex. 33). There was no odor until after Corporal Hagerty opened the suitcase (Tr. 590, 599). Furthermore, as in *Mercado, supra*, there were no weapons present which would indicate a perceived need to guard valuable cargo, such as a large cache of drugs (Tr. 323-613). Thus, just as in *Mercado*, there was insufficient evidence to prove that Appellant knew the contraband was there or that he directly or constructively exercised dominion over it. *Id.* at 690.

Further, the fact that a relatively large amount of contraband was found in the trunk of the car is not relevant to the key issue—whether Appellant had knowledge of the presence of the PCP in a single closed opaque suitcase in the trunk of the vehicle. *State v. Gonzalez*, 235 S.W.3d 20, 27 (Mo. App., S.D. 2007). In *Gonzalez*, the defendant and his passenger were stopped on eastbound I-44 for an unsignaled lane change. *Id.* at 25. The vehicle had an Arizona license plate and was registered to a third party. *Id.* The defendant and his passenger gave arguably different answers about their destination. *Id.* There was no clothing or luggage on the back seat. *Id.*

During a consent search, the officer in *Gonzalez* immediately noticed that the carpet underneath the back seat had been pulled away and was loose. *Id.* The back seat was loose, and when the officer lifted it, he discovered two large bundles containing marijuana. *Id.* More bundles of marijuana were discovered in the

trunk in a speaker box, which had its wires disconnected, as well as in the armrest panels, which were loose, and in the driver-side quarter panel. *Id.* at 25-26.

Approximately 40 pounds of marijuana were seized from the vehicle. *Id.* at 26.

The marijuana smelled like axle grease. *Id.* at 28. However, there was no evidence that the odor of axle grease was discernable to the occupants. *Id.*

While the state argued in *Gonzalez*, just as it does in the present case, that the conviction was supported by the fact that the defendant was traveling on a “known drug corridor” from a “drug-source state” (St.’s Brief p. 24), the court rejected this argument. *Id.* at 32, n. 9. The court in *Gonzalez* found that such evidence does not give rise to “a reasonable inference upon which a reasonable fact-finder could find beyond a reasonable doubt that a defendant had knowledge of the presence of an illegal drug otherwise hidden from plain view in the vehicle which he was driving.” *Id.* Probabilities do “not apply to an analysis of the sufficiency of the evidence to support a finding of guilt.” *Id.* “A criminal conviction cannot be based upon probabilities and speculation.” *Id.* at 27 (citations omitted). The Southern District court in *Gonzalez* reversed the defendant’s conviction due to insufficient evidence. *Id.* at 32.

Here, too, in the case of a jointly-occupied vehicle in which the prohibited substance was not in plain view or odorous, Appellant’s conviction cannot be based on probabilities and speculation notwithstanding the relatively large quantity found nor upon the road that was being traveled (Tr. 417, 599). As in

Gonzalez, the evidence is insufficient to prove that Appellant had knowledge or awareness of the presence or nature of the contraband. *Id.* at 32.

To serve the ends of justice, this Court should reverse Appellant's conviction due to insufficient evidence under the law cited in the above cases.

ARGUMENT

II.

The trial court clearly erred in failing to sustain Appellant’s Motion to Suppress Evidence and Statements and in allowing into evidence at trial the evidence obtained as a result of the traffic stop, because the prolonged detention of Appellant without reasonable suspicion of criminal activity and beyond the time reasonably required to complete a traffic ticket was unlawful and violated Appellant’s rights as guaranteed by the Fourth, Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 15 and 19 of the Missouri Constitution.

In a suppression hearing, “[t]he burden of going forward with the evidence and the risk of nonpersuasion shall be upon the state to show by a preponderance of the evidence that the motion to suppress should be overruled.” Section 542.296.6, RSMo; *State v. Franklin*, 841 S.W.2d 639, 644 (Mo. banc 1992). On appeal, the appellate court’s inquiry is limited to determining whether the trial court’s decision to deny the motion to suppress is supported by substantial evidence. *State v. Edwards*, 116 S.W.3d 511, 530 (Mo. banc 2003). “In reviewing the trial court’s ruling on the matter, this Court considers the record made at the suppression hearing as well as the evidence introduced at trial.” *State v. Deck*, 994 S.W.2d 527, 534 (Mo. banc 1999). An appellate court considers only those facts, as well as the reasonable inferences derived therefrom, that are favorable to the ruling. *Id.* On appeal, the trial court’s ruling will not be reversed unless the

decision is clearly erroneous, leaving the court with a definite and firm impression that a mistake has been made. *State v. Williams*, 97 S.W.3d 462, 469 (Mo. banc 2003). In the instant case, a mistake was definitely made.

In *Illinois v. Caballes*, 543 U. S. 405, 406, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005) the United States Supreme Court decided the narrow issue of “[w]hether the Fourth Amendment requires reasonable, articulable suspicion to justify using a drug-detection dog to sniff a vehicle during a legitimate traffic stop.” *Id.* (Emphasis added). Although the Court answered this question in the negative, it recognized that a “seizure that is justified solely by the interest in issuing a . . . ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission.” *Id.* (Emphasis added). *Caballes* does not stand for the proposition that the police may use a drug-sniffing dog in every traffic stop. *Id.* The holding in *Caballes* is based on the relatively unusual, narrow and specific facts and circumstances of that case.

The situation in *Caballes* was that two officers were present on the scene simultaneously. *Id.* One officer issued a traffic ticket to the driver while the other officer, simultaneously, took his drug dog around *Caballes*’ vehicle. *Id.* Under these circumstances, the Court held, where no additional detention beyond what was necessary to issue the traffic ticket took place, the use of the drug dog was permitted. *Id.* That is not the case with Appellant herein, Mr. Stover.

Corporal Hagerty prolonged this traffic stop, which was for a relatively minor alleged infraction, beyond the time reasonably required to have completed

his mission of writing a ticket for following too closely (Tr. 80, 567-568; St.'s ex. 33). "During a traffic stop, an officer may request a driver's license and vehicle registration, run a computer check, and issue a citation." *State v. Maginnis*, 150 S.W.3d 117, 120 (Mo. App. W.D. 2004). "The officer may ask questions beyond the scope of the stop only if there is an objectively reasonable suspicion of criminal activity." *Id.*

In *Maginnis*, the appellate court considered the tactics of the very same officer who was involved in the present case. Corporal Hagerty (spelled Haggerty in the *Maginnis* decision) made a routine traffic stop of the vehicle *Maginnis* was driving. *Id.* at 118. Upon questioning, the passenger and the defendant driver made inconsistent statements regarding the purpose and destination of their trip. *Id.* at 119. Corporal Hagerty asked for consent to search, and *Maginnis* declined. *Id.* A canine was deployed, it alerted to the presence of drugs in the vehicle, and Mr. *Maginnis* was ultimately convicted. *Id.* at 119-120.

The court found that "the substantial interrogation itself was not germane to the stop." *Id.* at 121. The court agreed that "under the Fourth Amendment it is not reasonable for the officer, in a routine traffic stop, to detain travelers for the purpose of interrogation on matters unrelated to the traffic violation, without, at that point, having any reasonable, articulable grounds for suspicion of illegal activities." *Id.* at 121. "An investigative detention pursuant to a stop must 'last no longer than is necessary to effectuate the purpose of the stop,' and '[t]he scope of the detention must be carefully tailored to its underlying justification.'" *Id.*

(quoting *Florida v. Royer*, 460 U.S. 491, 500, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983)). “The officer’s ‘fishing expedition’ questions went well beyond enforcement of the traffic laws.” *Id.* at 122. The court ultimately found that “[t]here was no grounds for suspicion of driving while intoxicated or any other criminal activity” and reversed the defendant’s conviction in *Maginnis*. *Id.* at 122.

In the instant case, Corporal Hagerty was again on a “fishing expedition,” just as he was in *Maginnis*. His questions about luggage, employment and the costs of the tickets were not germane to the traffic stop (Tr. 22, 25, 30, 88, 457; St.’s ex. 33). Corporal Hagerty’s questioning of Mr. Stover went well beyond enforcement of the traffic laws and should not be condoned by this Court.

The case of *State v. Sund*, 215 S.W.3d 719 (Mo. banc 2007) concerns a similar unlawful detention. In *Sund, supra*, an officer stopped the appellant for drifting onto the white dividing line of the traffic lane, because he wanted to check to see if the driver was intoxicated or falling asleep. *Id.* at 721. He asked the appellant a series of questions and determined that she was neither drunk nor sleepy. *Id.* He then asked the appellant to join him in his patrol car. *Id.* While in the patrol car, he asked the Appellant about the details of her trip. *Id.* at 721. She told him that she and her passenger were traveling out east to assist a friend with wedding preparations. *Id.*

He then asked the passenger about the details of their trip, and her answers were consistent with the appellant’s. *Id.* The officer completed the traffic stop by telling the appellant to “be careful” and handing her a warning ticket for improper

lane usage. *Id.* at 721-722. At that point, the officer asked if he could search the vehicle and its contents. *Id.* at 722. Initially, the appellant said, “sure,” but later retracted her consent when the passenger refused to consent to the search. *Id.* The officer then gave the women a choice between allowing him to search the trunk or waiting about forty minutes until a canine unit arrived. *Id.* It was only then that the women consented to the search. *Id.* In the trunk of the car, the officer found a duffel bag containing approximately 70 pounds of marijuana. *Id.*

In *Sund*, this Court reasoned that an officer is not “free to involuntarily detain a driver without reasonable suspicion under the guise of simply engaging in a voluntary conversation. An encounter is consensual only if ‘a reasonable person would feel free to disregard the police and go about his business.’” *Id.* at 723-724. The court found the “encounter was not consensual, but constituted a detention that was unreasonable because the officer did not have reasonable suspicion of criminal activity.” *Id.* at 725. “Because the marijuana admitted as evidence at trial was discovered as a direct result of that illegal detention, it must be excluded as fruit of the improper detention.” *Id.* This Court ultimately reversed the appellant’s conviction in *Sund*. *Id.*

In Mr. Stover’s case, he certainly did not feel free to disregard Corporal Hagerty and go about his business. Additionally, the officer testified that appellant was not free to leave (Tr. 85, 100). This constituted a detention that was unreasonable because he did not have grounds for reasonable suspicion of criminal activity. Corporal Hagerty prolonged this traffic stop, which was for a relatively

minor infraction, far beyond the time reasonably required to complete a traffic ticket for following too closely.

Likewise, in *State v. King*, 157 S.W.3d 656, 665 (Mo. App., W.D. 2005), the court reversed the defendant's convictions because the defendant was illegally detained following the initial traffic stop. The trooper had stopped the defendant for speeding and a seat belt violation. *Id.* at 662. The trooper articulated three reasons why he had detained the defendant after issuing him a speeding ticket. *Id.* at 663.

First, the defendant avoided eye contact with the trooper. *Id.* Second, the defendant exhibited signs of nervousness in that his leg was twitching—a condition associated by the trooper with methamphetamine use. *Id.* Third, the trooper had received information earlier that day that the defendant was seen leaving a house where there was suspected methamphetamine activity ongoing. *Id.*

The issue was whether the detaining officer possessed sufficient corroborating information independent of the prior police communication about suspected methamphetamine involvement. *Id.* at 663. The court found that the defendant's lack of eye contact and twitching was mere nervousness, which was “insufficient to create an objective reasonable suspicion that he was involved in criminal activity and thus, did not justify his continued detention.” *Id.* at 664. The incriminating evidence that was ultimately seized was tainted by the illegality of the trooper's continued detention of the defendant. *Id.* See also *State v. Granado*, 148 S.W.3d 309, 311 (Mo. banc 2004) (officer impermissibly extended the traffic

stop) and *State v. Weddle*, 18 S.W.3d 389, 394 (Mo. App., E.D. 2000) (defendant's excessive nervousness and fact that he "stared" at the van door alone cannot support reasonable suspicion).

In the case at bar, Corporal Hagerty never testified that Appellant was excessively nervous (Tr. 3-101, 382-613). He testified that he had suspicions before he even activated his emergency equipment (Tr. 423). Among the factors that Corporal Hagerty listed as significant in arousing his suspicions was the fact that the two occupants were of the same sex (Tr. 558-561, 594). This, of course, is simply not a valid reason as thousands of people travel in same sex pairs for perfectly innocent reasons. The officer denied that the fact that the two males were African-Americans was a factor in his mind, and, of course, such racial profiling would be improper.

The other factor he cited was that the car was a rental vehicle from California, which is a "source state" for drugs (Tr. 40, 70). However, it has been held that there is nothing inherently suspicious in the use of a rental vehicle, even if rented by a third person, to travel. *United States v. Beck*, 140 F.3d 1129, 1137 (8th Cir. 1998). Equally consistent with innocent behavior are out-of-state plates, and that factor is not probative of reasonable suspicion. *Id.* "Because millions of law-abiding Americans reside in California and travel, . . . means the officer's "source state" factor must be considered in that context. Innumerable other Americans travel to that state or through there for pleasure or lawful business.

Clearly, the vast number of individuals coming from that state must relegate this factor to a relatively insignificant role.” *Id.* at 1137-1138.

Ultimately, Corporal Hagerty acted on nothing more than a hunch.

“‘Reasonable suspicion’ must be more than an inchoate hunch.” *State v.*

Maginnis, supra at 121, citing *United States v. Sokolow*, 490 U. S. 1, 7, 109 S. Ct. 1581, 104 L.E.2d 1 (1989). “Hunches and suspicions, even if acted on in good faith, are not enough to warrant search or seizure.” *State v. Weddle, supra* at 394 (Mo. App., E.D. 2000) citing *State v. Hensley*, 770 S.W.2d 730, 734 (Mo. App., S.D. 1989).

However, even if this Court were to find that reasonable suspicion existed, the Missouri Court of Appeals, Western District was correct in finding that the Corporal was still dilatory in calling the canine unit, which resulted in an unlawful detention. *State v. Melvin Stover, Jr.*, Slip Op. WD 70594 (December 14, 2010).

Corporal Hagerty acted without reasonable suspicion and unlawfully detained the Appellant. Therefore, this Court should reverse his conviction, because all the evidence obtained as a result of the unlawful detention, including Trooper Oliver’s testimony (Tr. 321-378), should have been suppressed. Without the unlawfully obtained physical evidence and statements there was certainly insufficient evidence to convict the Appellant.

ARGUMENT

III.

The trial court clearly erred in failing to sustain Appellant's motion to suppress and in allowing into evidence at trial the statements Appellant made during the traffic stop prior to being *Mirandized* because the admission of these custodial statements deprived Appellant of his right to be free from self-incrimination as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Sections 18(a) and 19 of the Missouri Constitution in that the Appellant was not free to leave and *Miranda* warnings were required prior to Corporal Hagerty questioning Appellant while he was being detained.

Appellant asserts the trial court erred in denying Appellant's Motion to Suppress (L. F. 20, 24-25) and in allowing into evidence the pre-*Miranda* statements the Appellant made, because Appellant was effectively in custody and *Miranda* warnings were therefore required. The admission of these statements into evidence denied Appellant his constitutional right against self-incrimination.

As mentioned in Argument II, "the State bears both the burden of producing evidence and the risk of non-persuasion to show by a preponderance of the evidence that the motion to suppress should be overruled." *State v. Wilson*, 169 S.W.3d 870, 875-876 (Mo. App., W.D. 2005). Appellate review of a decision as to a motion to suppress evidence is limited to a determination of "whether there is substantial evidence to support [the trial court's] decision." *Id.* at 875. "The

trial court's ruling on a motion to suppress will be reversed only if it is clearly erroneous." *Id.* An appellate court reviews the trial court's decision viewing the facts and reasonable inferences therefrom in the light most favorable to the trial court's order. *Id.* In this case, the trial court's decision not to suppress the statements was clearly erroneous.

It is well established that a suspect must be advised of his rights under *Miranda* before custodial interrogation. *State v. Werner*, 9 S.W.3d 590 (Mo. banc 2000); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In *Miranda*, our nation's highest court stated "whatever the background of the person interrogated, a warning at the time of interrogation is indispensable to overcome its pressures and to insure that the individual knows he is free to exercise the [Fifth Amendment] privilege at that point in time." *Id.* at 469. "[W]hether *Miranda* warnings must be given in a particular case hinges on whether the suspect is in custody. . . ." *State v. Hosto-Worthy*, 877 S.W.2d 150, 152 (Mo. App., E.D. 1984).

In the *Hosto-Worthy* case, a police detective and social worker went to the defendant's home to interview her regarding allegations of child abuse. *Id.* at 151, 153. The detective and social worker were both permitted to enter the defendant's home. *Id.* The pair remained in the defendant's home for three hours, questioning her and taking photos of the home's interior. *Id.* The defendant was not given a *Miranda* warning and was not placed under arrest at that time. *Id.* Later, the defendant was formally charged and filed a Motion to Suppress all evidence that

was obtained during the home interview because she was denied her *Miranda* rights and the search of her home was done without a warrant. *Id.* The trial court sustained her suppression motion, and the state appealed.

On appeal, the court upheld the trial court's suppression ruling finding that *Miranda* warnings were required. *Id.* at 152-153 citing *State v. Lynn*, 829 S.W.2d 553, 554 (Mo. App., E.D. 1992) and *State v. Zancauske*, 804 S.W.2d 851 (Mo. App., S.D. 1991) (*Miranda* required in both cases where the defendants voluntarily went to police station for questioning and the interviews escalated to custodial interrogations).

In the case at bar, Appellant was effectively in custody as no reasonable person in Appellant's position would have felt free to leave. *See State v. Weddle*, 18 S.W.3d 389 (Mo. App., E.D. 2000). This was not a familiar setting to Appellant, as the defendant's home would have been in *Hosto-Worthy*, *supra*. Here, there were two officers in uniform detaining him in a patrol vehicle on the side of the highway (Tr. 93-94, 551-553; St.'s ex. 33). Corporal Hagerty took Appellant's driver's license from him and subjected him to questioning for 45 minutes until the drug dog arrived (Tr. 19, 67-68, 80, 568). At one point, Appellant even asked why he was being held (Tr. 589). Furthermore, Corporal Hagerty testified that Appellant was not free to leave from the moment he stopped him (Tr. 85, 92, 100). He also would have prevented Appellant from getting out of the patrol vehicle to retrieve the rental agreement from the car (Tr. 92). "These

circumstances amount to a show of official authority such that a reasonable person would not have felt free to leave.” *Weddle, supra* at 395.

The case of *State v. Wilson*, 169 S.W.3d 870 (Mo. App., W.D. 2005) is also instructive on this point. In *Wilson*, the trooper questioned Mr. Wilson and obtained incriminating information both before and after providing Mr. Wilson his *Miranda* warnings. *Id.* at 873-874. The court noted “[f]or an interrogation to be custodial, the questioning must occur “after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.”” *Id.* at 877 (emphasis added) (quoting *State v. Birmingham*, 132 S.W.3d 318, 322 (Mo. App., S.D. 2004)) (quoting *Miranda*, 384 U.S. at 444, 86 S.Ct. 1602).

This Court further reasoned in *Wilson*, that:

He was handcuffed and placed in the patrol car. He was not told that questioning was voluntary, that he was free to leave, or that he was not under arrest. He did not possess unrestrained movement. His initial contact with Trooper Reynolds was not voluntary. Although Trooper Reynolds did not use deceptive stratagems, the atmosphere was police dominated.

Id. at 878. The court concluded that Mr. Wilson was “in custody,” and affirmed the trial court’s decision to suppress the statements. *Id.* at 878-880.

Although, in the case at bar, Appellant was not handcuffed, he was made to sit in the patrol car with the two officers (Tr. 93-94, 551-553; St.’s ex. 33). Just as in *Wilson*, he was never told that questioning was voluntary, that he was free to

leave, or that he was not under arrest (Tr. 85, 92, 100; St.'s ex. 33). He did not possess unrestrained movement since Corporal Haggerty would not even have let him retrieve the rental agreement and testified that Appellant was not free to leave (Tr. 85, 92, 100). Obviously, his initial contact with the officers was not voluntary, and the atmosphere was police dominated (Tr. 11-12, 16, 414, 418; St.'s ex. 33).

While Corporal Hagerty claimed he did not "interrogate" Appellant (Tr. 587), his questions were clearly intended to elicit incriminating information, such as his questions about luggage (Tr. 22, 25; St.'s ex. 33). "A practice that the police should know is reasonably likely to evoke an incriminating response from a suspect thus amounts to interrogation." *Wilson, supra* at 878 (quoting *Rhode Island v. Innis*, 466 U.S. 291, 301, 100 S.Ct. 1682, 1690, 64 L.Ed.2d 297 (1980) (footnote omitted)).

Corporal Hagerty interrogated Appellant while depriving him of his freedom of action. This was a custodial interrogation without the benefit of *Miranda* warnings, and therefore the statements should have been suppressed. Without Defendant's statements, which were played repeatedly before the jury, the verdict would likely have been different. This Court should reverse Mr. Stover's conviction on this ground.

ARGUMENT

IV.

The trial court erred in allowing evidence and argument regarding Appellant's refusal to waive his Fourth Amendment right to consent to a search of the vehicle because such evidence and argument deprived Appellant of his rights to due process and to a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution in that such evidence and argument induced the jury to infer that Appellant was guilty based on his invocation of his Constitutional right against unreasonable searches and seizures.

It was error for the trial court to overrule Appellant's objections and to allow into evidence the testimony and the DVD containing Appellant's refusal to consent to a search and in allowing the prosecutor to use the DVD again in closing argument and to comment on it (Tr. 434-436, 493-496, 741, 788-789, 792; St.'s ex. 33). The state's use of Appellant's invocation of his Fourth Amendment right to induce the jury to infer guilt because Appellant refused to allow a search denied Appellant his rights to due process and a fair trial.

An appellate court reviews evidence presented at a criminal trial in the light most favorable to the verdict. *State v. Baumruk*, 280 S.W.3d 600, 607 (Mo. banc 2009). Since a trial court is vested with broad discretion to admit and exclude evidence, error will be found only if that discretion was clearly abused. *Id.* On

appeal, the court “reviews claims of trial court error ‘for prejudice, not mere error, and will reverse only if the error was so prejudicial that it deprived the defendant of a fair trial.’” *Id.* (quoting *State v. Morrow*, 968 S.W.2d 100, 106 (Mo. banc 1998)).

In the instant case, Appellant was prejudiced by the error such that he was deprived of a fair trial. Corporal Hagerty was allowed to testify, over defense counsel’s objection, that Appellant would not permit him to search (Tr. 434-436). Later during Corporal Hagerty’s testimony, the DVD of the traffic stop was introduced into evidence and played for the jury over Appellant’s objection on these grounds (Tr. 493-496; St.’s ex. 33). The DVD contains Appellant’s repeated refusal to waive his Fourth Amendment right against unreasonable searches and seizures (St.’s ex. 33). Then the prosecutor played the DVD again during closing argument (Tr. 741, 788-789, 792).

This issue is closely analogous to a prosecutor commenting on a criminal defendant’s invocation of his Fifth Amendment right not to testify or talk to officers at the time of his or her arrest, which has been found to be reversible error by our nation’s highest court. *Doyle v. Ohio*, 426 U. S. 610, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976); *Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). The rationale is that allowing such comment would be a “penalty . . . for exercising a constitutional privilege.” *Griffin*, 380 U.S. at 614, 85 S.Ct. at 1232-33.

Federal courts have not confined the *Griffin* rationale to the Fifth Amendment. In *United States ex rel. Macon v. Yeager*, 476 F.2d 613 (3rd Cir.) *cert. denied* 414 U.S. 855, 94 S.Ct. 154, 38 L.Ed.2d 104 (1973), the appellant consulted an attorney the day after the alleged crime, and the prosecutor argued that this action was inconsistent with innocence. The appellate court reversed the lower court's denial of a petition for habeas corpus. The appellate court held, relying on *Griffin, supra*, that a prosecutor may not argue that a criminal defendant's exercise of the Sixth Amendment right to counsel is evidence of guilt since such argument penalizes the exercise of a constitutional right. The court saw "little, if any, valid distinction between the privilege against self-incrimination and the right to counsel." *Id.* at 615.

Other jurisdictions have also held that the prosecution may not use a defendant's refusal to consent to a search as evidence of guilt. *See State v. Palenkas*, 933 P.2d 1269, 1280, 1282 (Ariz. Ct. App. 1996) (prosecutor's use of defendant's invocation of his right to refuse a warrantless search and contacting his attorney as evidence of his guilt denied due process and required a new trial); *Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979) (right to refuse consent to warrantless search of car would be "effectively destroyed if, when exercised, it could be used as evidence of guilt"); *Gomez v. State*, 572 So.2d 952, 953 (Fla. Dist. Ct. App. 1990) (police officer's comment on defendant's refusal to consent to a search without probable cause was constitutional error).

In this case, the fact that Appellant refused to consent to the search was brought to the jury's attention multiple times (Tr. 434-436, 493-496, 741, 788-789, 792; St.'s ex. 33). Then the prosecutor re-emphasized the point when he introduced this portion of the DVD during closing argument:

The Prosecutor: Think about when he was first asked for permission to search the car.

(Portion of videotape played.)

Mr. Viets: Your Honor, I have an objection—

The court: Stop the tape. Please.

(Videotape stopped.)

* * *

Mr. Viets: As I did before, I want to make sure I'm preserving my objection to playing of the refusal by the Defendant to consent to the search to the jury. I understand I raised that before, but I believe that's wrong to try to use a citizen's invocation of his constitutional rights as evidence that he's guilty of a crime, just as it would be for him to argue Mr. Stover must be guilty because he didn't choose to testify. This should not be presented.

The court: Overruled.

* * *

(Videotape played)

(Tr. 788-789).

“The standard of review for alleged error in closing argument depends upon whether defense counsel objects. Where defense counsel objects, appellate courts will reverse the trial court’s decision with regard to closing argument only upon a showing of abuse of discretion by the trial court.” *State v. Shurn*, 866 S.W.2d 447, 460 (Mo. banc 1993). In this case, defense counsel did object, and the trial court abused its discretion in overruling the objection (Tr. 788-789). A prosecutor has a duty to insure a fair trial for each defendant. *State v. Schwer*, 757 S.W.2d 258, 264 (Mo. App., E.D. 1988). Here, however, the prosecutor’s use of the DVD to highlight Appellant’s invocation of his Fourth Amendment right in order to persuade the jury to infer guilt was improper.

The repeated admission of the evidence of Appellant’s refusal to consent to a search, particularly on the DVD, and the use of it during the prosecutor’s closing argument, cannot be said to be harmless error. As stated in Argument I, the evidence against Appellant was far from overwhelming. The use of the DVD at trial was pervasive, and it prejudiced the jury against Appellant. Appellant should not be penalized for exercising his Constitutional right. *Griffin, supra*, 380 U.S. at 614, 85 S.Ct. at 1232-33. A reversal or new trial is therefore in order.

ARGUMENT

V.

The trial court abused its discretion in overruling Appellant's hearsay objection and allowing the testimony of Corporal Hagerty regarding the commendation he received in this case for making the largest PCP seizure in the history of the United States up until 2003 because by doing so the court deprived Appellant of his rights to cross-examination of the witnesses against him and to due process and a fair trial as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18 (a) of the Missouri Constitution in that the evidence was inadmissible hearsay, irrelevant and calculated to inflame the passions of the jury against Appellant.

Appellant contends it was error for the trial court to allow the state over defense counsel's objection to elicit testimony from Corporal Hagerty regarding the commendation he testified that he received in this case from the United States Drug Enforcement Administration for making the largest PCP seizure in the history of the United States because the evidence was offered, and later argued, to prove the truth of the matter asserted (Tr. 546-547, 793-797). The evidence was irrelevant to the issue of Defendant's guilt or innocence, served to inflame the passions of the jury against Appellant and denied him his rights to cross-examine the witnesses against him and to due process and a fair trial.

“When ruling on the admission or exclusion of evidence at trial, trial courts have broad discretion, and absent a clear abuse of that discretion, [an appellate court] will not disturb the trial court’s ruling on such evidence.” *State v. Robinson*, 111 S.W.3d 510, 513 (Mo. App., S.D. 2003). The appellate court reviews for prejudice, not mere error, and reverses only if the error was so prejudicial that the defendant was deprived of a fair trial. *Id.* “Improperly admitted evidence should not be declared harmless unless it can be said to be harmless without question and the record demonstrates the evidence did not influence the jury or the jury disregarded it.” *Id.* at 514 (quoting *State v. Russell*, 872 S.W.2d 866, 869 (Mo. App., S.D. 1994)). “In a jury trial, when evidence is admitted that should have been excluded, this court is required to assume that the jury considered that evidence as it reached its verdict.” *Robinson, supra* at 514 (quoting *Gates v. Sells Rest Home, Inc.*, 57 S.W.3d 391, 396 (Mo. App., S.D. 2001)).

“Hearsay statements are out-of-court statements used to prove the truth of the matter asserted, and are generally inadmissible.” *Robinson, supra* at 513 citing *State v. Barnett*, 980 S.W.2d 297, 306 (Mo. banc 1998). Hearsay is objectionable because the person who provides the information about that which another witness testifies is not under oath or subject to cross-examination. *Id.*

In *Robinson, supra*, the court reversed the defendant’s conviction when the state introduced hearsay testimony that an informant told the investigating officer that the defendant was keeping controlled substances at a residence. *Id.* at 513-

515. The state argued that the evidence was admissible to show subsequent conduct by the officer. *Id.* at 513. The court rejected the state's theory and found that the evidence went beyond the scope necessary to show subsequent conduct of law enforcement and was prejudicial. *Id.* at 515. The *Robinson* court reversed and remanded for a new trial. *Id.* See also, *State v. Berezuk*, 55 S.W.2d 949, 952 (Mo. 1932) (evidence of what was said in telephone conversation was inadmissible hearsay and its admission was reversible error).

In the instant case, the following occurred:

[The prosecutor] Q. Did you receive any commendations from any agencies for this seizure?

[Corporal Hagerty] A. Yes.

Q. From whom?

A. From the Drug Enforcement Administration.

Q. What was that commendation?

Mr. Viets: I object, the question calls for hearsay.

The court: overruled.

Q. What was that commendation for?

A. For the largest seizure, drug interdiction seizure of PCP in the United States up until 2003.

(Tr. 546-547).

The evidence that the United States Drug Enforcement Administration had deemed this the largest PCP seizure in American history was not competent

evidence under any theory. It certainly did not go to any subsequent conduct on the law enforcement officer's part. *Robinson, supra* at 515. Furthermore, the state repeatedly argued this evidence to the jury for the truth of the matter during closing argument (Tr. 793-797). This could only have served to inflame the passions of the jury against Appellant. When the evidence of Appellant's guilt was not otherwise strong, it indicates that the jury was influenced by this improperly admitted irrelevant and highly prejudicial hearsay evidence. Appellant is entitled to a reversal due to this error.

ARGUMENT

VI.

The trial court erred in overruling Appellant's objection to the verdict-directing instruction, instruction No. 6, because the verdict director did not require the jury to find that Appellant knew of the substance's content and character or that he was aware of its presence and nature which prejudiced Appellant and denied him his rights to a fair trial and due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Sections 10 and 18(a) of the Missouri Constitution.

Appellant contends that the trial court erred in overruling his objection and in submitting the verdict-directing instruction, instruction No. 6, to the jury in that it contained no requirement for the jury to find that Appellant knew of the substance's content and character nor that he was aware of its presence and nature, and thus it did not properly or clearly define the meaning of possession or trafficking (L. F. 77-78, 95-96; Tr. 737-738). Appellant was thereby prejudiced and denied his constitutional rights to a fair trial and due process of law.

An instructional error is reviewed for an error in submitting the instruction and prejudice. *State v. Zink*, 181 S.W.3d 66, 74 (Mo. banc 2005). "An instruction is to be read as a whole and all instructions are to be construed together." *State v. Sallee*, 436 S.W.2d 246, 251 (Mo. 1969). "A verdict-directing instruction must contain each element of the offense charged and must require the jury to find every

fact necessary to constitute essential elements of [the] offense charged.” *State v. Ward*, 745 S.W.2d 666, 670 (Mo. banc 1988).

In the instant case, the verdict director failed to require the jury to find every fact necessary to constitute the essential elements of the offense charged. It failed to require that the jury find that the Appellant knew of the substance’s content and character nor that he was aware of its presence and nature. Instruction No. 6 as submitted to the jury read as follows:

“If you find and believe from the evidence beyond a reasonable doubt:

First, that on or about November 25, 2003, in the County of Lafayette, State of Missouri, the defendant or Oris Butler, possessed 90 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP), a controlled substance, and

Second, that such conduct was a substantial step toward the commission of the offense of trafficking in the first degree by attempting to distribute, deliver, or sell to another person 90 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP), a controlled substance, and

Third, that defendant or Oris Butler engaged in such conduct for the purpose of committing such trafficking in the first degree,

then you will find that the offense of trafficking in the first degree has occurred, and if you further find and believe from the evidence beyond a reasonable doubt:

Fourth, that with the purpose of promoting or furthering the commission of that trafficking in the first degree, the defendant acted alone or together with or aided Oris Butler in committing the offense,

then you will find the defendant guilty of trafficking in the first degree.

However, unless you find and believe from the evidence beyond a reasonable doubt each and all of these propositions, you must find the defendant not guilty of that offense.

A person commits the crime of trafficking in the first degree of a controlled substance if he knowingly distributes, delivers, or sells 90 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP), a controlled substance.

As used in this instruction, the term “substantial step” means conduct that is strongly corroborative of the firmness of the defendant’s or Oris Butler’s purpose to complete the commission of the offense of trafficking in the first degree.

As used in this instruction, the term “possessed” means either actual or constructive possession of the substance. A person has actual

possession if he has the substance on his person or within easy reach and convenient control. A person who is not in actual possession has constructive possession if he has the power and intention at a given time to exercise dominion or control over the substance either directly or through another person or persons. Possession may also be sole or joint. If one person alone has possession of a substance, possession is sole. If two or more persons share possession of a substance, possession is joint.

As used in this instruction, controlled substance includes phencyclidine (PCP).

As used in this instruction, a person acts purposely, or with purpose, with respect to the person's conduct or to a result thereof when it is his or her conscious object to engage in that conduct or to cause that result.

(L.F. 77-78, 95-96; A5-A6).

While this instruction is patterned after MAI-CR3d 325.10.2, it was modified and omitted the crucial defining language "knowing of the substance's content and character," which should have been included at the end of the paragraph which states: "A person commits the crime of trafficking in the first degree of a controlled substance if he knowingly distributes, delivers, or sells 90 grams or more of a mixture or substance containing a detectable amount of

phencyclidine (PCP), a controlled substance.” (L.F. 77, 95). MAI-CR3d 325.10.2.

Additionally, although possession of the substance was the first element that the jury was required to find under instruction No. 6, the verdict director did not require the jury to find that Appellant knew or was aware of the presence and nature of the substance as would be required in any simple possession case (L.F. 77-78, 95-96). MAI-CR3d 325.02. Thus, the elements were not clearly defined and were, no doubt, confusing to the jury. Under instruction No. 6 as given, the jury had no choice but to find Appellant guilty. *State v. Burns*, 457 S.W.2d 721, 726 (Mo. 1970).

The *Burns* case is similar to the instant case and persuasive authority for reversal. In *Burns*, the defendant was charged with possession of marijuana and there was no question that the defendant had actual possession of the package which contained the marijuana, at least for a few moments. *Id.* at 725-726. This Court held that there was sufficient proof to make a submissible case to the jury of conscious possession. *Id.* However, the court further found that:

The state’s main verdict-directing instruction, instruction No. 2, however, had no requirement that the jury must find there was a knowing possession on the part of the defendant. This was reversible error. The instruction informed the jury that if they found “. . .the defendant . . .feloniously and unlawfully have in his possession a quantity of Marijuana. . .then you will find the defendant guilty of having a narcotic drug in his possession. . .” As

defendant argues, there is no question but that defendant, at least for a few seconds, possessed the package which, in turn, contained the marijuana. Thus, under instruction No. 2, since the jury was not required to find defendant knew the package contained the substance in question, the jury, in effect, had no choice but to convict.

Id. at 725-726. The state argued in *Burns* that the error was cured by another instruction which stated in part, “It is sufficient for the State to show that the drug was in his custody and possession, knowingly and intentionally.” *Id.* at 726 (emphasis added). Yet, this Court rejected this argument and reversed the judgment of conviction and remanded for a new a trial.

Just as the verdict director in *Burns* was prejudicial and left the jury with no choice but to convict, the verdict director in the instant case was similarly flawed. Here, the evidence was that Appellant was in a car, which had a suitcase containing PCP in its trunk (Tr. 355, 418-468, 669-670). Thus, under instruction No. 6, since the jury was not required to find Appellant knew the suitcase contained the substance in question nor the substance’s content and character nor that he had any awareness of its presence and nature, the jury, in essence, had no choice but to convict under the verdict director simply because the PCP was in the car.

The verdict director’s omission of the critical MAI language “knowing of the substance’s content and character” and the failure to include any requirement

that the possession must be knowing possession by an awareness of the presence and nature of the substance requires a reversal. Appellant was denied a fair trial due to this faulty verdict director.

CONCLUSION

WHEREFORE, for the reasons stated in Arguments I and II, Appellant prays this Court reverse his conviction and discharge him. For the reasons stated in Arguments III through VI, Appellant prays this Court reverse his conviction and grant him a new trial.

Respectfully submitted,

/s/ Dan Viets

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify:

That the attached brief complies with the limitations contained in Supreme Court Rule 84.06(b) and contains 14,826 words, excluding the cover, certificate of service, signature block, appendix and certification as determined by Microsoft Word Software; and

That a copy of this brief has been served via the e-filing system and a copy was mailed, postage prepaid, on this 19th day of September 2011 to Evan Buchheim, Assistant Attorney General, 207 W. High, P. O. Box 899, Jefferson City, MO 65102-0899.

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